

### Remarks

By this Amendment Claim 1 has been amended, Claims 18 and 19 cancelled, and new Claim 20 added.

Claims 11-19 stand rejected as unpatentable over Lerg et al (Lerg) in view of Balzer and Bergmann et al (Bergmann) in further view of Ansmann et al (Ansmann). The rejection is respectfully traversed.

In an earlier Office Action with respect to both the Lerg and Hermann references, the Examiner took the following position:

"Specifically, both Lerg and Hermann references teach cosmetic composition comprises large amount of oil (30-45% and 20-60%) in cited references versus 0.1-20% herein). One of ordinary skill in the art would have understood that the limitation of water content was applied because of this specific condition. It would have been obvious to one of ordinary skill in the art to employ more water when oil content was low. For example, forming emulsion composition with the help of other surfactant (emulsifier)."

In other words, the Examiner's position was that since the Lerg and Hermann references contained a large amount of oil, it stood to reason that there would be far less water or conversely in Applicant's case since there was a relatively minor amount of oil, there would be more water. The Examiner now takes the position, with respect to Lerg and Hermann, that mere optimization is involved and more specifically that "a known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use" citing *In re Gurley* 31 USPQ 2d 1130, 1132 (Fed. Cir. 1994). The Examiner then concludes that a diluted form of a known cosmetic or pharmaceutical composition, even though known to be inferior (for its inconvenience) is deemed obvious to its concentrated form and is not patentably distinct from

the concentrated form.

To begin with, the facts of *In re Gurley* are inapposite to the facts of this case. In *In re Gurley* the reference disclosed forming a circuit board from epoxy albeit that the reference suggested such circuit boards have less desirable physical properties than those made using a fibrous substrate impregnated with a polyester-imide resin instead of epoxy resin. Nonetheless, the facts in *In re Gurley* showed a clear unmistakable, indeed even anticipating disclosure of a circuit board made with an epoxy resin.

The facts in *In re Gurley* in no way resemble the facts of this case. Applicant's composition is simply not, as suggested by the Examiner, optimization of a result effective parameter. The Lerg reference distinguished itself from the prior art so-called high oil content preparations in that it had a "markedly low oil content" see column 2, lines 25-26. In other words, Lerg was trying to achieve a composition which, notwithstanding that it had a much lower oil content than the prior art compositions, nonetheless had advantages over the prior art of possessing higher foaming and better tolerated. However, to achieve this result a critical limitation of the Lerg composition was that it contain no more than 3.5% by wt. water based on the total weight of the preparation. Employing this critical, low water content, Lerg claims that surprisingly there is produced a composition with lower oil content which can refat the skin to the same extent as prior art compositions having much higher oil contents with the added advantage over the prior art of being higher foaming and better tolerated.

Applicant's composition accomplished what Lerg wanted to accomplish, i.e., lowered oil content, better foaming and better tolerated. Applicant's accomplished that goal by use of a microemulsion which contained at maximum 20% by wt. of an oil component, and 20 to 95% by wt. water as compared with Lerg's 30-45% by wt. of an oil compound and a maximum 3.5% water.

Nonetheless, Applicant's compositions, as seen on page 3, line 29 - page 4, line 10 combined the cleaning properties of an aqueous surfactant formulation, the cosmetic properties of an oil component and were better tolerated in terms of being a non-irritant to the skin. Applicants did not optimize the Lerg composition, they made a patentable improvement over the Lerg composition.

The Examiner's reliance on *In re Boesch and Slaney* 204 (sic) USPQ 215 (CCPA 1980) is misplaced. As the Court said in *In re Boesch* the prior art would have suggested "the kind of experimentation necessary to achieve the claimed composition, including the proportional balancing described by Appellant's Nv equation." 205 USPQ at 219. Lerg, in no way, suggests "the kind of experimentation necessary to achieve Applicant's claimed composition." To the contrary, while Lerg claims to have made a marked improvement in a shower preparation by reducing the oil content vis-a-vis the prior art while still retaining the ability to refat the skin to the same extent, this goal is accomplished by using an oil content of from 30-45% by wt. and a water content of at most 3.5% by wt. What possible motivation would the skilled artisan have had to arrive at a water content of 20-95% by wt. when Lerg teaches that the maximum water that can be tolerated is 3.5% by wt.? It can hardly be argued that when Applicant's claimed range is 20-95% by wt., Applicant's invention amounts to mere optimization of a composition which is limited to "at most 3.5% by wt." The Examiner's position is simply without any merit. Applicant reiterates the arguments previously presented that Lerg teaches away from Applicant's composition by stressing that the maximum amount of water that can be used is 3.5% by wt.

Lerg falls short of Applicant's invention for three reasons:

1. Lerg does not teach that the compositions are emulsions or a microemulsions;
2. Teaches that a water content of no more than 3.5% by wt. can be tolerated; and

3. Teaches that the oil content must be from 30-45% by wt.

In an attempt to cure the infirmities of Lerg as outlined above, the Examiner resorts to Balzer, Bergmann and Ansmann. The Examiner relies on Balzer for its teaching that fatty alcohol ether sulphate alkanolammonium salt, or fat fatty alcohol sulphate alkanolammonium salt are known to be emulsifiers in cosmetic or pharmaceutical compositions containing oil components; however, nowhere in Balzer is there a teaching of using Applicant's compounds as set forth in (A) wherein  $R^4$  is hydroxyisopropyl. Furthermore Balzer does not teach the presence of mono- or polyvalent  $C_2$ - to  $C_{24}$ - alcohols. Again, Applicants would emphasize that alkyl polyglycosides (APG) are not "polyvalent  $C_2$ - to  $C_{24}$ - alcohols."

Furthermore, the emulsions of Balzer require the presence of at least 80 wt. % APG. The Examiner will note that Applicant's composition as set forth in Claim 11 requires that components (A) to (D) add up to 20.7 wt. % meaning that the required "at least 80 wt. % APG cannot be present."

Furthermore, as to the attempted modification of Lerg and Balzer since Balzer requires 80 wt. % APG the teaching of Balzer cannot be combined with Lerg what requires at least 30 wt. % oil component. More specifically, Lerg discloses that the any surfactant such as APG is to be present only in an amount of up to 5 wt. % (see column 6, line 15). Lastly, APG is not suggested by Lerg as a further surfactant. Perhaps of greater importance, the infirmity of Lerg vis-a-vis the amount of water is clearly not cured by resort to Balzer which requires much more water be present, i.e., greater than 3.5 wt. %. There is simply no way that the Balzer teaching can be used to modify Lerg in any meaningful way vis-a-vis rendering Claim 11 obvious.

The further combination of Lerg and Balzer with Bergmann still does not cure the infirmities of Lerg vis-a-vis Claims 11 and 20. In essence, the teachings of Bergmann are the same as Balzer save that in Bergmann triethanolamine salts of lauryl sulphate and lauryl ether sulphate are

specifically mentioned, albeit in a shotgun disclosure of numerous other surfactants. However, the triethanol-amine salts mentioned in Bergmann are not disclosed as part of a microemulsion but rather as part of a composition comprising a cleansing surfactant to which a microemulsion may be added. In this regard, the Examiner's attention is directed to column 18, lines 34-46 of Bergmann where it is stated "The microemulsion compositions of the present invention can be formulated into a hair conditioning product, absent cleansing surfactants, but can be formulated into hair shampoo/conditioner compositions, including anionic, amphoteric or nonionic surfactants." In other words, the triethanol-amine salts mentioned in Bergmann are part of the cleansing composition and it is not taught that the cleansing composition further comprises an oil component such as component (C) set forth in Applicant's Claims 11 and 20. Furthermore, Bergmann requires significant amounts of water to be present and in this regard the Examiner's attention is directed to column 18, lines 5-6 where it is taught that the water content should be greater than 50 wt. %. Clearly, such a teaching flies in the face of the Lerg reference.

With respect to the Ansmann reference, that patent has been cited for its teaching that diluted cosmetic or pharmaceutical emulsions with alkenyl (ether) sulphates (including alkanolamino salts) are known in the art. However, as in the case of Bergmann and Balzer, Ansmann fails to cure the infirmities of the Lerg reference vis-a-vis the water content. Furthermore, although an alkanol (ether) ammoniumsulphate is disclosed, there is no teaching that the substituent on the sulphate group is isopropoxy but rather is only alkyl metal, alkaline earth metal, ammonium, alkylammonium, alkenolammonium or glucaammonium. Lastly, Ansmann does not disclose microemulsions.

As can be seen from the above analysis of the references, there is no way that the skilled artisan, with all of those references available would arrive at Applicant's composition. To begin with, and as exhaustively pointed out above, the Lerg would send the skilled artisan on an entirely

different path - one not towards Applicant's invention. That being the case, any attempt to combine Lerg with any of the secondary references is an exercise in futility and does not lead to Applicant's claimed composition as set forth in Claims 11 and 20. It is respectfully submitted that Claims 11-17 and 20 are clearly patentable over Lerg in view of the secondary references.

Claims 11-19 stand rejected as unpatentable over Hermann et al (Hermann) in view of Balzer and Bergmann and in further view of Ansmann. This rejection is likewise respectfully traversed. The Balzer, Bergmann and Ansmann references have been discussed and distinguished above. With respect to Hermann, that reference, like the Lerg reference teaches that the amount of water present must be kept low, e.g., not in excess of 15 % by wt., of the composition. Applicant would again point out that the teachings of Lerg and Hermann point to the fallacy of the Examiner's position previously stated that if the oil content is high, one simply lowers the amount of water. While Lerg discloses 30-45% by wt. oil and at most 3.5% by wt. water, Hermann discloses 20-60% by wt. oil but up to 15% by wt. water, i.e., nearly 5 times the amount that Lerg says is acceptable for basically the same amount of oil.

The reason Bergmann can tolerate much more water than Lerg is because Lerg and Hermann disclose different compositions. Likewise, the reason Applicant can tolerate even larger contents of water is because Applicant's composition is different from Hermann and Lerg. Additionally, like Lerg, Hermann cannot tolerate Applicant's claimed oil content. Applicant's remarks above regarding the case law cited by the Examiner vis-a-vis Lerg are equally applicable to the Examiner's position with respect to the Hermann reference. As to any proposed combination of Hermann with Balzer, Bergmann or Ansmann, Applicant's remarks above with respect to the combination of those secondary with Lerg are equally applicable. It is respectfully submitted Claims 11-17 and 20 are patentable over Hermann in combination with any of the secondary references.

It is respectfully submitted that the Examiner has misinterpreted the present invention. Applicant's invention is not buttressed on the use of alkanolammonium salt of alkyl (ether) sulphates. Rather, Applicant's invention as set forth in independent Claims 11 and 20 are directed to specific isopropanolammonium salts of alkyl (ether) sulphates and then, in combination with at least three other components in well defined weight ranges. None of the references approach Applicant's claimed compositions as all references differ in at least two if not three respects. With particular respect to Claim 20, that claim is in the more closed format employing the phrase "consisting essentially of", which further distinguishes Claim 20 from the cited art. The examples in Applicant's specification show that the microemulsions produced possess high cleaning and foaming ability, good initial foaming power, storage stability and mildness to the skin. It can be argued that Lerg, Hermann and Applicant's compositions all are directed at skin cleaning composition of one kind of another. However, it is at that point that the similarity between the composition of the two primary references and Applicant's composition ends. Indeed, as noted above, Applicant's composition differs from the composition of either Lerg or Hermann more than the two latter compositions differ from each other. Nonetheless, they are all different compositions and patentably distinct from one another.

In view of the foregoing amendments and remarks, it is respectfully submitted that Claims 11-17 and 20 are in condition for allowance, which is hereby earnestly solicited and respectfully requested.

Respectfully submitted,



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By: \_\_\_\_\_

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